



## Tenth Circuit Decision Reinforces Federal Clean Air Act Citizen Suits Against Mobile Sources

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In its recent decision in *Utah Physicians for a Healthy Environment (UPHE) v. Diesel Power Gear, LLC, et al.*, a matter involving the hosts of Discovery Channel’s popular show “Diesel Brothers,” the Tenth Circuit Court of Appeals unanimously upheld for the first time a successful citizen suit under the federal Clean Air Act (CAA) targeting mobile source emissions. While typically citizen suits under the CAA have only been successful against stationary sources, in *UPHE* the Tenth Circuit found that citizens and citizen groups could effectively demonstrate Article III standing to challenge mobile sources’ violations of the CAA. [*Utah Physicians for a Healthy Environment v. Diesel Power Gear, LLC, et al.*, \_\_\_F.4th\_\_\_, Case No. 20-4043 (10th Cir. Dec. 28, 2021).]

### Background

In 2017, Utah Physicians for a Healthy Environment (UPHE), a nonprofit organization of Utah healthcare professionals and concerned citizens, filed suit in the U.S. District Court for the District of Utah against a group of Utah companies and individuals involved with the Discovery Channel show “Diesel Brothers.” The “Diesel Brothers” defendants bought and made custom modifications to large diesel trucks for resale and eventually featured these custom built trucks on its Discovery Channel show. UPHE claimed that the defendants violated the CAA and Utah’s State Implementation Plan (SIP) by tampering with emissions-control devices and installing “defeat devices” on various vehicles that would allow the vehicles to evade emissions standards. UPHE further alleged these violations resulted in “the excessive emission of harmful pollutants from diesel vehicles” into the air shed of the Wasatch Front, an area in northern Utah with some of the most polluted air in the country.

The U.S. District Court for the District of Utah found in favor of UPHE, ordering the defendants to pay over \$760,000 in civil penalties and granting injunctive relief enjoining the defendants from installing defeat devices and owning or selling any vehicles with inoperable emissions control systems.

### The Tenth Circuit’s Decision

#### Article III Standing

On appeal, the Diesel Brothers defendants challenged UPHE's Article III and statutory standing, the District Court's inclusion of certain kinds of transactions in its tabulation of violations, and the District Court's penalty analysis.

To demonstrate Article III standing, UPHE must establish it has suffered an injury in fact that is: 1) concrete and particularized; 2) fairly traceable to the challenged action of the defendant; and 3) able to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Here, defendants challenged the second prong, arguing that the District Court erroneously determined that UPHE's injury was fairly traceable to defendants' violations by using an incorrect causation standard. The District Court found causation because defendants' violations merely contributed to the pollution in the Wasatch Front.

Defendants contended that in the context of air pollution, causation can only be met where a violation "meaningfully contributes" to the pollution. Thus, defendants argued that UPHE needed to show that its injury is substantially linked to defendants' misconduct beyond merely showing defendants contributed to the pollution. Defendants emphasized that there are a substantial number of third parties whose independent decisions collectively effected the pollution in the Wasatch Front. And, only a few dozen of defendants' trucks were briefly driven in Utah over the course of five years without required emissions control systems resulting in just 0.02 tons of pollutants, compared to the millions of tons of pollutants emitted from other sources like oil refineries and wildfires in the area.

## **Rejection of the Meaningful Contribution Standard**

The Tenth Circuit rejected Defendants' meaningful contribution standard. The Court of Appeals pointed out that the "meaningful contribution" standard first appeared in the U.S. Supreme Court decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007). But the Tenth Circuit noted that the meaningful contribution standard in *Massachusetts v. EPA* applied to greenhouse gas emissions and could not be compared to the emissions of "noxious gases and harm to those who breathe the air into which the gases are emitted." Further, the court sided against the defendants for public policy reasons. According to the court, adopting the "meaningful contribution" standard would require "major surgery on the CAA's citizen-suit provision." Highlighting the citizen suit provision's purpose of increasing public enforcement where the government lacks resources, the court explained that without such a provision, the government could only realistically pursue the worst offenders. Citizens enforcing penalties on just a few motor vehicles, by contrast, would be a rare occurrence.

## **Judicial Precedent**

Finally, the Court of Appeals pointed to precedent to support its opinion. The court drew attention to numerous cases in other circuits in which plaintiffs were granted standing to enforce the provisions of the CAA or Clean Water Act after being injured by various pollutants. The court specifically cited to *Sierra Club v. EPA*, 964 F.3d 882, 887-88 (10th Cir. 2020) as possible "precedential mandate." In *Sierra Club*, the Tenth Circuit confirmed the Sierra Club's standing to sue the EPA to compel it to object to a CAA permit issued by Utah for an industrial plant merely because the plant's emissions contributed to air pollution, despite the existence of other third party polluters.

## Conclusion and Implications

Although historically only the government has successfully pursued penalties against mobile sources for violations of the Clean Air Act, this Tenth Circuit Court of Appeals' decision opens the door for and may possibly encourage more citizen suits against mobile sources in the future. While the court's decision is a partial win for UPHE and others in its position, the court notably determined that standing may not exist where plaintiffs pursue claims against polluters that are "too distant." Thus, UPHE does not have standing to pursue violations for trucks that were driven out of the state of Utah. The court further determined that UPHE could not pursue penalties for defeat devices that were marketed but not actually sold. Finally, the Court of Appeals also vacated the District Court's determination of certain penalties, finding that such penalties were too high, and remanded for reconsideration. The Tenth Circuit's opinion is available online at:

<https://www.ca10.uscourts.gov/sites/ca10/files/opinions/010110624784.pdf>